TAN HOO ENG & ORS A

v.

LIM KECK ENG & ORS

HIGH COURT MALAYA, IPOH B
LEE SWEE SENG J
[CIVIL SUIT NO: 22NCVC-53-05-2014]
29 OCTOBER 2014

CIVIL PROCEDURE: *Transfer of action - From one High Court to another - Jurisdiction - Forum conveniens - Whether forum of choice agreed by parties in agreements - Whether application for transfer justified - Whether transfer would safe court's resources and time - Whether applicant discharged burden of proving that transfer would be more convenient, appropriate and fair - Courts of Judicature Act 1964, s. 23(1)* C D

The plaintiffs commenced an action against the defendants in the Ipoh High Court ('Ipoh HC') for a tort under intimidation, threats, duress, oppression and harassment with respect to the signing of a settlement agreement and a supplementary agreement to that. The plaintiffs prayed for a declaration that the agreements entered into were null and void as a result and for damages to be assessed. The settlement agreement involved the transfer of some six pieces of the plaintiffs' land to the first defendant ('D1') or his nominee to settle the debts due to D1 in the businesses carried out through the vehicle of two companies of which the first plaintiff ('P1') and D1 were equal shareholders and the only two directors. The plaintiffs had applied for an injunction to restrain the transfer of the lands. However, the defendants had applied in encl. 17 for the proceedings to be transferred to Kuantan High Court ('Kuantan HC') as the court had the most substantial connection with the plaintiff's claim. The plaintiffs objected to the application on the ground that their claim was in tort and therefore the trial should be in the High Court within which local jurisdiction the cause of action arose. The plaintiffs contended that the purported agreements were signed in Ipoh, Perak. The question for determination was whether the court should decline jurisdiction and transfer the proceedings to the Kuantan HC on the ground that the proceedings could be more conveniently and fairly tried. E F G H I

Held (granting order in terms of encl. 17 with costs in cause):

(1) Whilst couched as a claim in tort, the core of the plaintiff's claim was, in reality, to set aside the contracts in the settlement agreement and the supplementary agreement and to have them declared null and void. So, though the claim was expressed in tort, it was in essence a claim to vitiate the contracts under the Contracts Act 1950. Under the Contracts Act 1950, assuming that there was coercion, fraud and misrepresentation, the agreement was a contract that was voidable and until it was set aside, remains a valid contract capable of enforcement. (paras 14 & 24)

(2) The proviso to s. 23(1) of the Courts of Judicature Act 1964 ('CJA') gives the parties the freedom and right to agree on the forum to bring the dispute and it is sensible when a dispute as anticipated may be heard in one of a few physical locations, depending on the criteria chosen, for the parties to want to agree beforehand to avoid disputes on forum. In commercial bargains, the law leans in favour of upholding bargains and not in striking them down (*Charles Grenier Sdn Bhd v. Lau Wing Hong*, refd). Such a right in deciding the forum to hear a dispute is a term of contract which the court would uphold. Such a right is akin to a right that parties may freely negotiate and be bound by an agreement entered into. (paras 27-29)

(3) The contract itself, under cl. 8 of the supplementary agreement, provided that '... any dispute shall be submitted to the courts in Malaysia at Kuantan'. Thus, until the agreements were set aside, one would have to uphold the agreements on the choice of the forum as presumably the parties must have applied their minds to it and they did not want to be inconvenienced by a trial in Ipoh High Court or that they did not want any time to be dissipated arguing over which was the proper forum to bring the dispute. The court would give effect to the intention of the parties and therefore, the proceedings should be transferred to the Kuantan HC. (paras 26, 27 & 31)

(4) Whilst P1 had used her Ipoh residence address in all her affidavits, her business was in Karak, Pahang and all the documents relating to the business were in the business

premises in Karak. Further, based on where the defendants reside or have their place of business, the defendants had justification for wanting the proceedings to be heard in Kuantan. In any event, it was the Kuantan HC that would have a most real and substantial connection with respect to the claims of the parties as clearly the disputes could be traced to the two businesses, both having their business in Karak, and the running accounts for the business dealings between the two companies. (paras 38, 39 & 43)

(5) This was not a case of 'land the ownership of which is disputed is situated' in sub-para. (d) of s. 23(1) of the CJA. The dispute was over the agreements of which the lands were one of the subject matters and if the agreements were set aside, then the subject matter fell with it. (para 45)

(6) There was also a pending proceeding in the Kuantan HC under O. 81 of the Rules of Court 2012 pertaining to a suit for specific performance of the settlement agreement and the supplementary agreement. In light of this, it would be undesirable for two courts to come up with two different decisions with respect of what was essentially a dispute involving the self-same agreements. There would be much saving in terms of the court's resources and time of all involved if the two suits were heard together or consolidated. (paras 46 & 47)

(7) In cases of transfer of proceedings, the burden is on the applicant to satisfy the court why the transfer to another court would be more convenient, appropriate and fair for the trial of the case. The defendants herein had discharged the burden. (para 49)

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694 ***(refd)***

Jurutera Consultant (SEA) Sdn Bhd & Ors v. Eddie Lee Kim Tak & Ors [1999] 1 CLJ 564 CA ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(foll)***

Raja Thangiah v. Baldev Singh Bhar [2001] 7 CLJ 130 HC ***(refd)***

The Abidin Daver [1984] AC 398 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 15, 16, 19, 20
Courts of Judicature Act 1964, ss. 3, 23(1)(a), (b), (c), (d)
Federal Constitution, art. 121(1)
Rules of Court 2012, O. 57 r. 1(1), O. 81

For the plaintiffs - Gurbachan Singh; M/s Bachan & Kartar
For the 1st to 5th defendants - Muhammad Shafee Abdullah (Jacob Goldie with him); M/s Jacob Goldie SS Chew

Reported by S Barathi

JUDGMENT

Lee Swee Seng J:

[1] The plaintiffs have commenced an action against the defendants in the Ipoh High Court for what is ostensibly a tort under intimidation, threats, duress, oppression and harassment with respect to the signing of a settlement agreement dated 11 February 2014 and a supplementary agreement to that dated 3 March 2014. The plaintiffs have prayed for a declaration that the agreements entered into are null and void as a result and for damages to be assessed.

[2] As the settlement agreement involved the transfer of some six pieces of the plaintiffs' land to the first defendant (D1) or his nominee, the plaintiffs have applied for an injunction to restrain the transfer of the said lands, which were to be transferred to settle the debts due to the first defendant (D1) in the businesses carried out through the vehicle of two companies of which the first plaintiff (P1) and the first defendant (D1) are equal shareholders and the only two directors. The second plaintiff (P2) is a director of the third plaintiff (P3) Dyera-Tim Sdn Bhd and P1 is a majority shareholder in P3.

[3] The first to the fifth defendants (D1-D5) ("the defendants") have applied in encl. 17 for the proceedings to be transferred to the Kuantan High Court as that is the court having the most substantial connection with the plaintiffs' claim. The plaintiffs objected to the application on ground that as their claim is in tort, the trial should be in the High Court within which local jurisdiction the cause of action arose. The purported agreements were signed in the office of P3 in Ipoh, Perak.

[4] The sixth and seventh defendants (D6-D7) have through their counsel indicated their support of the application for transfer. A

Principles

[5] To begin with there are constitutionally only two High Courts in Malaysia as provided under art. 121(1) of the Federal Constitution: B

> **121. Judicial power of the Federation**
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely: C
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and D
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine. E

[6] There are of course many branches of the two High Courts, each having its own local jurisdiction for ease of administration of justice with respect to the physical proximity of parties to the local High Court as well as the most real and substantial connection of the dispute in terms of where the cause of action has arisen and other factors *vis-à-vis* the branch of the High Court in question. F

[7] Thus "jurisdiction" under the Courts of Judicature Act 1964 ("CJA") has at least three perspectives: local jurisdiction, subject matter jurisdiction and monetary jurisdiction. G

[8] The "local jurisdiction" of the High Court is defined in s. 3 CJA to mean:

(a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and H

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan. I

[9] The local jurisdiction of the two High Courts is further determined with respect to the criteria set out in s. 23(1) of the CJA below:

> Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings **where**:
>
> (a) **the cause of action arose**; or
>
> (b) **the defendant or one of several defendants resides or has his place of business**; or
>
> (c) **the facts on which the proceedings are based exist or are alleged to have occurred**; or
>
> (d) any land the ownership of which is disputed is situated,
>
> **within the local jurisdiction of the court** and notwithstanding anything contained in this section **in any case where all parties consent in writing within the local jurisdiction of any other High Court**. (emphasis added)

[10] Order 57 r. 1(1) of the Rules of Court 2012 ("ROC") provides the procedure for the transfer of proceedings from one court to another court of co-ordinate jurisdiction as follows:

> Transfer of proceedings to another Court:
>
> (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court **can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction**, he may on application by any party, order the proceedings to be transferred to the other Court. (emphasis added)

[11] There is no doubt that the High Court in Malaya at Ipoh has jurisdiction to hear the plaintiffs' claim as the settlement agreement and supplementary agreement were signed in Ipoh and the alleged acts of intimidation, threats, duress, oppression and harassment took place in Ipoh. The question is whether upon an application made by the defendants, this court should decline jurisdiction and transfer the proceedings to the High Court in Malaya at Kuantan on ground that the proceedings can be more conveniently and fairly tried in the High Court in Malaya at Kuantan. That question must be determined with respect to the criteria set out in s. 23 of the CJA.

[12] The authority for such an approach to the question of transfer of proceeding can be found in the case of *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22 where Augustine Paul J (later FCJ) explained as follows at pp. 30-31:

> Although it is clear that there are only two High Courts in Malaysia there are several branch High Courts in the different states of the country. The establishment of the branch High Courts is contemplated by art. 121 of the Federal Constitution itself by its reference to the "principal registry" which implies the existence of subsidiary or branch registries. On the status of these branch High Courts reference may be made to *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 where Lim Beng Choon J said at p. 270:
>
> > It is implicit that a High Court located at Penang or at Alor Star is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.
>
> In referring to this case Edgar Joseph Jr J (as he then was) said in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ at p. 180; [1989] 3 MLJ 509 at p. 512:
>
> > The case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state.
>
> *The result is that a plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state* (see *Re Application of Asia Insurance Co Ltd* [1968] 2 MLJ 228). I therefore hold that **this Court has jurisdiction to entertain** this action even if the defendant is correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also. But, as Lim Beng Choon J observed in *Sova Sdn Bhd*, *that is not the end of the matter as the critical issue for determination is whether this court is the forum conveniens to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so*. His Lordship added at p. 271:

A However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:

B

(i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the inconvenience caused may outweigh the amount of costs awarded to him;

C

D

E

(ii) the obvious reason for the setting up of a branch of the High Court in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.

F

For the reasons as stated above, I do not think that the present civil proceedings should be dealt with by this court. I am also of the view that it is for the defendants to apply to this court for a transfer of the civil suit and the application made by the plaintiff under O. 81(1) to the High Court in Malaya at Penang or Kuala Lumpur since the cause of action arose in Penang but the parties have their places of business in Kuala Lumpur. (emphasis added)

G

H

Where The Cause Of Action Arose And Agreement Of Parties On Forum (S. 23(1)(A) And 23(1) Proviso CJA)

[13] The plaintiffs' learned counsel Mr Bachan Singh argued that the cause of action is in tort and that he is claiming for damages for fraud and/or improper dealings and also damages for intimidation, threats, duress, oppression and harassments by the defendants. The tort as alleged took place in the premises of P3

I

in Ipoh and so learned counsel submitted confidently that the cause of action arose in Ipoh itself. See *Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson* [1971] 1 All ER 694. A

[14] Whilst couched as a claim in tort, the core of the plaintiffs' claim is in reality to set aside the contracts in the settlement agreement and the supplementary agreement and to have them declared null and void. So though the claim is expressed in tort, it is in essence a claim to vitiate the contracts under the Contracts Act 1950. B C

[15] Prayer (a) at p. 39 of the statement of claim had asked for a declaration that the various transfer documents signed with respect to the transfer of six properties under the settlement agreement and the supplementary agreement is null and void, bad in law and of no legal effect. D

[16] Prayer (b) at p. 39 of the statement of claim is for a prayer that the memorandum of transfers pertaining to the six properties and all applications thereof and relating thereto are fraudulent, without valuable consideration, null and void, bad in law and of no legal effect. E

[17] Prayer (c) at p. 30 of the statement of claim is for a prayer that all documents purportedly executed by the plaintiffs are null and void, bad in law and of no effect. F

[18] Prayer (d) is for a declaration that all transfers of the vehicles, seven forklifts, moulding machinery and equipment are null and void, bad in law and of no legal effect.

[19] Prayer (e) is for a retransfer back of those properties, vehicles, forklifts and moulding machinery and equipment in the event that the transfers had already taken place. G

[20] Only two prayers in prayers (h) and (i) are for damages for fraud and/or improper dealings and for unlawful, wrongful and improper conduct such as intimidation, threats, duress, oppression and harassment by all the defendants. H

[21] I agree with learned counsel for the defendants, Encik Muhammad Shafee Abdullah, that the over-arching claim is to set aside the agreements and the claim under tort is only a subsidiary claim. Therefore until the agreements are set aside, one must look I

at what the parties have agreed on the issue of the place or forum where the dispute should be brought for hearing. Whilst there has been allegations that P1 was under undue pressure and harassment and even intimidation to sign away the plaintiffs' landed assets and motor vehicles in what is now being disputed as to who owe what to whom and how much, between the two protagonists in P1 and D1, there has been no suggestion that cl. 8 of the supplementary agreement was exacted and extracted from P1 under the same condition.

[22] Intimidation, threats and duress as alleged in the statement of claim would come within the meaning of "coercion" as defined in s. 15 of the Contracts Act as follows:

> 15. "Coercion" is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

[23] Oppression and harassments as referred to in the statement of claim would come under "undue influence" as defined in s. 16 of the Contracts Act as follows:

> 16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

[24] Under the Contracts Act 1950, assuming for a moment that there was coercion, fraud, and misrepresentation, the agreement is a contract that is voidable and until it is set aside, it remains a valid contract capable of enforcement. Section 19 of the Contracts Act provides as follows:

> **19. Voidability of agreements without free consent**
>
> (1) When consent to an agreement is caused by **coercion, fraud, or misrepresentation,** the agreement is a **contract voidable** at the option of the party whose consent was so caused.
>
> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. (emphasis added)

[25] If by "oppression" and "harassment" is meant "undue influence" under the Contracts Act, then s. 20 provides as follows:

> 20. **Power to set aside contract induced by undue influence**
>
> When consent to an agreement is caused by **undue influence**, the agreement is a **contract voidable** at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just. (emphasis added)

[26] The contract itself provide for where the parties should bring their claims in court if there is a dispute. Clause 8 of the supplementary agreement provides as follows:

> The SA and this Supplementary Agreement is governed by and shall be construed in accordance with the laws of Malaysia and **any dispute shall be submitted** to the **Courts in Malaysia at Kuantan**, Pahang Darul Makmur. (emphasis added)

[27] At any rate, until the agreements are set aside, one will have to uphold the agreements on the choice of the forum as presumably the parties must have applied their minds to it and that they do not want to be inconvenienced by a trial in Ipoh High Court or that they do not want any time to be dissipated arguing over which is the proper forum to bring the dispute. The

proviso to s. 23(1) CJA clearly gives the parties the freedom and right to agree on the forum to bring the dispute and it is sensible when a dispute as anticipated may be heard in one of a few physical locations, depending on the criteria chosen, for the parties to want to agree before hand to avoid disputes on forum.

[28] One might recall that in commercial bargains, the law leans in favour of upholding bargains and not in striking them down as was reiterated in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327.

[29] Such a right in deciding the forum to hear a dispute is a term of contract which the court would uphold. Such a right is akin to a right that parties may freely negotiate and be bound by an agreement entered into. In *Jurutera Consultant (SEA) Sdn Bhd & Ors v. Eddie Lee Kim Tak & Ors* [1999] 1 CLJ 564; [1999] 1 MLJ 381, there was a cl. A13 of a settlement agreement which precluded the parties from appealing against the decision of the High Court. It reads:

> Both parties agree that the decision of the High Court shall be final and conclusive and binding on the parties. The parties further undertake not to appeal against the High Court decision.

[30] The Court of Appeal observed as follows as was summarised at p. 381 in the headnotes:

> Paragraph A(13) was a perfectly valid and enforceable agreement. It had the effect of precluding this court from entertaining the appeal. In the absence of a valid appeal, no question of a stay pending the outcome of an appeal may arise under s 44 of the Courts of Judicature Act 1964. A right of appeal, though a creature of statute, is a substantive right. Like any other valuable right, it may form the subject matter of a contract and may be bargained away. Actual or potential litigants may therefore agree that the decision of a court of first instance shall be final and that neither of them shall appeal against it. This is in keeping with the doctrines of freedom and sanctity of contract.

[31] As there is a cl. 8 in the supplementary agreement where the parties have agreed for the dispute to be heard in the Kuantan High Court and as an agreement is valid until set aside and declared null and void, this court will give effect to the intention of the parties and so the proceedings shall be transferred to the Kuantan High Court.

[32] However this court would also consider if there are other conditions stated in s. 23(1) CJA which would justify the proceedings being heard in the Kuantan High Court quite apart from the agreement of the parties to have the dispute so heard in that forum.

Where The Defendants Reside Or Have Their Place Of Business (S. 22(1)(b) CJA)

[33] I must proceed to consider which other sub-paragraph of s. 23(1) CJA apply. The basis for this has the support of the *Malacca Securities*' case (*supra*) where Augustine Paul J (later FCJ) observed as follows at p. 39:

> ... It thus becomes necessary to consider the legal effect of the section [s. 23(1) CJA]. It has four sub-paragraphs. The comma appearing at the end of sub-paras. (a), (b), (c) and (d) in the section followed by the word "or" means that **they must be construed disjunctively**. Thus a party instituting a proceeding in a particular branch of the High Court may do so if his case falls within any one of the sub-paragraphs. That was the basis on which Abdul Hamid J (as he then was) determined the jurisdiction of the court in *Lam Kok Trading Co (Pte) Ltd v. Yorkshire Switchgear & Engineering Co Ltd* [1979] 1 MLJ 239. (emphasis added)

[34] Here is a case where the main protagonist in D1 resides in Mentakab, Pahang as stated in all his affidavits filed.

[35] The timber moulding business of Blue Star Moulding Sdn Bhd ("BSM") and that of Blue Star Sawmill Sdn Bhd ("BSS") are in Karak, Pahang and these are the two businesses where disputes have arisen as to who owes what to the other as both P1 and D1 are the only directors of BSM and BSS and they are equal shareholders of BSM and BSS as well. BSM have in turn a series of business dealings with BSS where sale of timber is concerned. The settlement agreement and the supplementary agreement were supposed to have settled the outstanding accounts of the two companies *vis-à-vis* its two equal shareholders in P1 and D1 in BSM and BSS.

[36] D2 also has his place of business at BSS in Karak, Pahang. D3 has his residence at Jerantut, Pahang and a place of business at Rosa Timber Trading Sdn Bhd at Jerantut, Pahang. Both D3 and D4, though based in Perak, have also indicated their agreement to the proceedings being held in Kuantan (para. 4 of

encl. 16) and they have in their affidavits filed in encls. 39 and 40 respectively, confirmed that they are agreeable to the matter being heard in Kuantan.

[37] D5 and D6 have also indicated in encl. 51 in their affidavits that they have no issue with the case being heard in the Kuantan High Court.

[38] Whilst P1 has used her Ipoh residence address in all her affidavits, yet her business in BSM is also in Karak and all the documents relating to the business are in the business premises in Karak. D1 further averred that the relevant witnesses with respect to the running of the timber moulding business are from Karak, Pahang. There is also the saving of costs factor in terms of travel and convenience of the witnesses.

[39] Based on where the defendants reside or have their place of business, the defendants do have their justification for wanting the proceedings to be heard in Kuantan.

Where The Facts On Which The Proceedings Are Based Exist (S. 23(1)(c) CJA)

[40] The dispute that has arisen had its genesis in the businesses of P1 and D1 in two companies BSM and BSS, both having their business in Karak, Pahang. The context in which the settlement agreement was drafted can be seen in the recitals to the settlement agreement referred to as exh. B in encl. 16, the affidavit in support of the defendants' transfer application. The recitals stated as follows:

(A) D1 and P1 are equal shareholders and directors of BSM, a company into the business of timber moulding. The management of BSM's business was solely entrusted onto P1.

(B) D1 is also an equal shareholder and director of BSS, a company carrying out a sawmill business. BBS is also one of the suppiers of timber to BSM.

(C) P1 is a majority shareholder and director of Dyera-Tim Sdn Bhd ("P3"), a company carrying on business of sawn timber trading.

(D) D1 is having disputes with P1 and/or P3 on the management of BSM.

(E) D1 is claiming from P1 and/or P3 damages for the losses suffered due to such disputes and P1 and/or P3 had earlier made a proposal for a separation scheme and to pay D1 a specific sum of money as full and final settlement of the disputes.

(F) The Parties are desirous to settle the dispute amicably and have agreed to enter into this Agreement upon the terms and conditions herein contained.

[41] The settlement consists of D1 exiting BSM as a shareholder and director once P1 has complied with her obligations under the settlement agreement. Her obligations included the payment of an agreed sum of RM4 million to D1 and also a sum of RM9.75 million to BSS being an amount owing by BSM to BSS for the timber stocks purchased from BSS. The payments were by way of nine post-dated CIMB Bank cheques all dated 28 February 2014. Other considerations included the transfer of the six properties to D1 and the transfer of vehicles and forklifts from BSM to BSS.

[42] Any disputes arising out of how the above sums had been arrived at would involve adducing evidence from the business transactions between BSM and BSS and both businesses are at Karak. If there the amounts due from BSM under the management of P1 to BSS are correct, it would lend credence to the fact that the parties then entered into the settlement agreement to settle their differences with D1 exiting from BSM at the end of the unlocking of the business between BSM and BSS.

[43] In a very real sense, the facts on which the proceedings are based exist in Karak, Pahang and not in Ipoh. The business dealings between BSM and BSS would have to be scrutinised to ascertain how much is owing by BSM to BSS. D1 must be prepared to show how the various sums are arrived at in the event that P1 wants to go behind the settlement agreement. It is the Kuantan High Court that would have a most real and substantial connection with respect to the claims of the parties as clearly the disputes can be traced to the two businesses of BSM and BSS and the running accounts for the business dealings between the two companies. See the House of Lords case of *The Abidin Daver* [1984] AC 398.

[44] On that score the proceedings ought to be transferred to and be heard in the Kuantan High Court.

[45] Mr Bachan for the plaintiffs submitted that out of the six pieces of land the subject matter of transfer under the settlement agreement, three are in Ipoh and one in Wilayah Persekutuan and two in Kuala Langat, Selangor. None of the lands are in Pahang. However, here is not a case of "land the ownership of which is disputed is situated" in sub-para. (d) of s. 23(1) CJA. The dispute is over the agreements of which the lands are one of the subject-matters and if the agreements are set aside, then the subject matter falls with it. It is not a case of parties challenging the validity of registration of lands and hence the ownership of the lands in which instance then the dispute should rightly be heard where the lands are situated.

[46] There is also afoot a suit filed in the Kuantan High Court by D1 here as plaintiff there against P1 and P3 as defendants there. It is basically for specific performance of the settlement agreement and the supplementary agreement. Though filed subsequent to this suit, D1 had proceeded with summary judgment under O. 81 Rules of Court 2012 ("ROC") and the matter had been fixed for hearing on 16 October 2010.

[47] It would be undesirable for two courts to come up with two different decisions with respect to what is essentially a dispute involving the self-same agreements, one party seeking to set it aside and the other party seeking to enforce it by way of specific performance. One is a flipside of the other's claim and there would be much saving in terms of court's resources and time of all involved if the two suits are heard together or consolidated.

[48] Learned counsel for the defendants, Mr Jacob Goldie was prepared to give his undertaking to court to consent that the two suits be consolidated if this suit is transferred to the Kuantan High Court.

[49] In all cases of transfer of proceedings, the burden is on the applicant to satisfy the court why the transfer to another court would be more convenient, appropriate and fair for the trial of the case. See *Raja Thangiah v. Baldev Singh Bhar* [2001] 7 CLJ 130. The defendants have discharged this burden.

Pronouncement

[50] As can be seen, even if s. 23(1)(a) CJA favours the plaintiffs, the proviso to s. 23(1) and sub-paras. (b) and (c) favour the defendants. That would tilt the balance in favour of the defendants for the transfer.

[51] Taking all the circumstances of the case into consideration, I am constrained to transfer this proceeding to the Kuantan High Court and so I had granted an order in terms of encl. 17 for the said transfer with costs in the cause.